

2004

State of Utah v. Richard White : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

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| STATE OF UTAH | : | |
| Plaintiff/Appellee | : | |
| Vs. | : | |
| | : | Case No. 20040439-CA |
| RICHARD WHITE | : | |
| Defendant/Appellant | : | |

BRIEF OF APPELLANT

This is an appeal from a finding of guilt by a jury for Assault of a Police Officer, a class A misdemeanor, and resisting arrest a class B misdemeanor. The Defendant was found guilty on April 1, 2004. He was sentenced on May 11, 2004 to a term of one year in the county jail. The Defendant was placed on probation and all but two months of the jail time was suspended. This Court has jurisdiction pursuant to U.C.A. §78-2a-3(e).

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ATTORNEYS FOR APPELLEE

Oral Argument not requested

UTAH COURT OF APPEALS
BRIEF
UTAH
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TABLE OF CONTENTS

| | |
|--|-------|
| TABLE OF AUTHORITIES | i, ii |
| JURISDICTIONAL STATEMENT..... | 1 |
| ISSUES ON APPEAL AND STANDARD OF REVIEW..... | 2 |
| CONSTITUTIONAL OR STATUTORY PROVISIONS..... | 4 |
| STATEMENT OF THE CASE..... | 7 |
| STATEMENT OF FACTS..... | 7 |
| SUMMARY OF ARGUMENT..... | 11 |
| ARGUMENT | 11 |

POINT 1

| | |
|--|-----------|
| THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTIONS SEVEN AND TWELVE OF THE UTAH CONSTITUTION BY HIS ATTORNEY’S FAILURE TO MOVE THE TRIAL COURT FOR A DIRECTED VERDICT. | 11 |
|--|-----------|

POINT II

| | |
|--|-----------|
| THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO ENTER A DIRECTED VERDICT OF AQUITTAL AT THE CLOSE OF THE PROSECUTIONS CASE FOR REASONS THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION. | 18 |
| CONCLUSION | 22 |

| | |
|----------------------------------|----|
| CERTIFICATE OF MAILING | 23 |
|----------------------------------|----|

TABLE OF AUTHORITIES

FEDERAL CASES

| | |
|--|-------------------|
| <i>Kimmelman v. Morrison</i> , 477 U.S. 365, 375, 386 (1986) | 13 |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 686, 687, 688 80 L.Ed.2d 674, 692, 693 (1984)..... | 2, 11, 12, 14, 15 |

UTAH STATE CASES

| | |
|--|--------|
| <i>State v. Bradley</i> , 752 P.2d 874, 876 (Utah 1985)..... | 3 |
| <i>State v. Dunn</i> , 850 P.2d 1201, 1208 (Utah 1993)..... | 3 |
| <i>State v. Holgate</i> , 10 P.3d 346, 350, 351 (Utah 2000)..... | 18, 19 |
| <i>State v. Mead</i> 27 P.3d 1115, 1132 (Utah 2001)..... | 19 |
| <i>State v. Petree</i> , 659 P.2d 443, 445, 446 (Utah 1983)..... | 20 |
| <i>State v. Rudolph</i> , 3 P.3d 192, 196 (2000)..... | 19 |
| <i>State v. Shumway</i> , 63 P.3d 94, 100 (Utah 2002)..... | 21 |
| <i>State v. Smith</i> , 65 P. 3d 648, 655, 656 (Utah Ct. App. 2003)..... | 14 |
| <i>State v. Smith</i> , 927 P.2d 649, 651 (Utah Ct. App. 1996)..... | 3 |
| <i>State v. Templin</i> , 805 P.2d 182 (Utah 1990)..... | 2 |
| <i>State v. Workman</i> , 852 P.2d 981, 984, 985 (Utah 1993)..... | 19 |

STATUTES AND RULES

UTAH CODE ANNOTATED

| | |
|-----------------------------|-------|
| U.C.A. §76-5-102.4..... | 4,7 |
| U.C.A. §76-5-102(1)(c)..... | 4, 17 |

U.C.A §76-8-305.....4, 17

U.C.A. §78-2a-3(e).....1,5

UNITED STATES CONSTITUTION

Fourth Amendment.....5, 13

Sixth Amendment.....2, 6, 11

Fourteenth Amendment.....2, 6, 11

UTAH CONSTITUTION

Article 1 Section Seven.....2, 5, 11

Article 1 Section Twelve.....2, 5, 11

UTAH RULES OF CIVIL PROCEDURE

Rule 17(p).....7, 18

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a finding of guilt by a jury for Assault of a Police Officer, a class A misdemeanor, and resisting arrest a class B misdemeanor. The Defendant was found guilty on April 1, 2004. He was sentenced on May 11, 2004 to a term of one year in the county jail. The Defendant was placed on probation and all but two months of the jail time was suspended. This Court has jurisdiction pursuant to U.C.A. §78-2a-3(e).

ISSUE ON APPEAL AND STANDARD OF REVIEW

POINT I

WAS THE DEFENDANT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTIONS SEVEN AND TWELVE OF THE UTAH CONSTITUTION BY HIS ATTORNEY'S FAILURE TO MOVE THE TRIAL COURT FOR A DIRECTED VERDICT?

STANDARD OF REVIEW: The appellate court must determine as a matter of fact and law whether the Defendant was denied his right to effective assistance of counsel. In *Strickland v. Washington*, 466 U.S 668, 80 L.Ed.2d 674 (1984), the United States Supreme Court articulated a two part test, which was adopted in *State v. Templin*, 805 P.2d 182 (Utah 1990), to determine whether counsel was ineffective. The Court held that;

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at 466 U.S. at 687, 80 L.Ed. 2d at 693.

POINT II

DID THE TRIAL COURT COMMIT PLAIN ERROR IN FAILING TO ENTER A DIRECTED VERDICT OR ACQUITTAL AT THE CLOSE OF THE PROSECUTION'S CASE FOR THE REASONS THAT THERE WAS

INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION?

STANDARD OF REVIEW: This Court should use a question of law standard of review. “We reverse the jury’s verdict in a criminal case when we conclude as a matter of law that the evidence was insufficient to warrant conviction.” *State v. Smith*, 927 P.2d 649, 651 (Utah Ct. App. 1996). Furthermore, this Court should review the evidence “in a light most favorable to the jury verdict,” *State v. Bradley*, 752 P.2d 874, 876 (Utah 1985), and reverse the Defendant’s conviction only if “the evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the Defendant committed the crime.” *Smith*, 927 P.2d at 651 (citations and quotations omitted). Since Defendant’s attorney didn’t move for a directed verdict it should be reviewed under a plain error standard of review. “[T]o establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) an error exists, (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant . . .” *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UTAH STATUTES

U.C.A. §76-5-102(1)(c)

1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or\

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

U.C.A §76-8-305.

A person is guilty of a Class B Misdemeanor if he has knowledge, or by the exercise of reasonable care should have knowledge, that a peace officer is seeking to effect a lawful arrest or detention o that person or another and interferes with the arrest or detention by:

1) Use of force or any weapon;

2) The arrested person's refusal to perform any act required by lawful order;

a. Necessary to effect the arrest or detention; and

b. Made by a peace officer involved in the arrest or detention; or

3) The arrested person's or another person's refusal to refrain from performing any act that would impede the arrest or detention.

U.C.A 76-5-102.4. **Assault against peace officer -- Penalty.**

(1) Any person who assaults a peace officer, with knowledge that he is a peace officer, and when the peace officer is acting within the scope of his authority as a peace officer, is guilty of a class A misdemeanor.

(2) A person who violates this section shall serve, in jail or another correctional facility, a minimum of:

(a) 90 consecutive days for a second offense; and

(b) 180 consecutive days for each subsequent offense.

(3) The court may suspend the imposition or execution of the sentence required under Subsection (2) if the court finds that the interests of justice would be best served and makes specific findings concerning the disposition in writing or on the record.

§78-2a-3(e).

UTAH CONSTITUTION

Article I, Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

UNITED STATES CONSTITUTION

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UTAH RULES OF CIVIL PROCEDURE

RULE 17(P)

At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

STATEMENT OF THE CASE

The Defendant was charged by Information with five separate offenses.

(R. 001). A jury found him guilty of counts one and two, assault against a peace officer in violation of U.C.A. §76-5-102.4 and interfering with arrest in violation of §76-8-305. (R. 109/181).

STATEMENT OF THE FACTS

On July 30, 2004, the Defendant became involved in a heated argument with his step-son. (R. 109/55-57). They were arguing and in “each other faces.” (R. 109/59). The Defendant pushed his step-son. (R. 109/509). A family member called the police because the step son had swung a fist at his

mother during an earlier confrontation. (R. 109/123) Officer Joshua Carr from the Brigham City Police Department arrived at the Defendant's home.

Officer Carr went inside the Defendant's home. While he was inside the home he asked the Defendant if he had any weapons on his person. (R. 109/70). The Defendant answered that he did. (R. 109/70). Officer Carr testified on direct examination that the Defendant put his hand in his pocket. (R. 109/71). Officer Carr told him to pull his hand out. He testified that "[a]t that point he did pull his hand out pretty aggressively. I looked down real quick to look at his hand and I did notice a knife in his hand." (R. 109/71).

On cross-examination, Officer Carr acknowledged that the knife wasn't open and that the Defendant pulled it out of his pocket and said you may consider this to be a weapon. (R. 109/83-84). Officer Carr also testified on cross-examination that "I don't recall exactly what happened, other than the fact that he had his hand in his pocket with the knife. I asked him to just keep his hands out of his pocket. And he forcefully pulled his hand out of his pocket with the knife in his hand. At that point I pulled the knife out of his hand as I'm trained to do." (R. 109/85).

After Officer Carr took the knife from the Defendant he held Defendant's left wrist in a wrist lock so he could "maintain control until I could search him for any further weapons." (R. 109/72). While Officer Carr had the

Defendant in a wrist lock the Defendant had something in his right hand.

Officer Carr told him to drop it and he wouldn't. The Defendant tried to pull away from the officer. (R. 109/72). Officer Carr testified that he pulled the Defendant back so that the officer was between the Defendant and his family. (R. 109/73). The officer testified that at this time the Defendant began "to fight me." (R. 109/73).

When the prosecutor asked him what the Defendant did, Officer Carr testified, "I didn't detail exactly what he did physically because things were happening so quickly. I just remember that this is probably I think the second time in my career that I ended up in an actual physically demanding position." (R. 109/73).

Officer Carr also testified that "I put in my report the struggle continued against the back of the front door as well." He also said that they "flipped around and there was a wall right here." (R. 109/73). Officer Carr testified that "I had his wrist, left wrist, like so. He had his right arm above him. He was making the comments, as I quoted in my report, fuck you." (R. 109/74).

Officer Carr also testified that "At this point he was pushing away from the wall to try and gain mobility to fight with me. I was pushing him closer to the wall to restrain his mobility and gain access to his other arm. At this point in our struggle he was pushing and I was pushing." (R. 109/74).

While this struggle was happening, the Defendant's family started to yell at the officer to let him go and "he's not fighting you." (R. 109/74). Officer Carr and the Defendant began sliding along the wall and pictures were knocked off the wall and broken. They slid into a corner where the Defendant couldn't get away from Officer Carr. (R. 109/74).

Officer Carr tried to pull Defendant's arm back around but couldn't. (R. 109/76). Officer Carr loosened his grip on the Defendant so he could pull his arm down. The Defendant then "sucked it [his arm] up underneath his chest area and kept it away from me." (R. 109/76). The prosecutor asked what happened next. Officer Carr answered, "at that point he made a very abrupt movement with his left elbow upward and he hit Officer Mackley in the chin and in the face." (R. 109/77).

The two officers were then able to get control of the Defendant and place handcuffs on him. (R. 109/77). Once the Defendant was on the ground he continued to yell obscenities and "thrash" around. (R. 109/100-01). The Defendant eventually blacked out and was transported to the hospital. (R. 109/104-05).

Officer Carr was asked if he sustained any injuries. (R. 109/77). He answered that he didn't realize it at the time but he noticed later that he had an "abrasion on his elbow, some blood there, and my shoulder kind of hurt on the

inside, my right shoulder.” (R. 109/78). Curiously, Officer Mackley was not asked whether he suffered an injury. Officer Mackley testified that “when his arm was freed from my grasp, he turned his head over his left shoulder and threw his elbow up into my face, striking me in the nose.” (R. 109/100). Officer Mackley did not testify as to the amount of force that was used, how hard he was hit or whether he suffered any kind of injury.

SUMMARY OF ARGUMENTS

The Defendant raises two points on appeal. First, his trial counsel was ineffective when he failed to move the trial court for a directed verdict at the conclusion of the State’s case. Second, the trial court committed plain error when it didn’t dismiss the case due to insufficiency of the evidence.

ARGUMENT

POINT 1

THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTIONS SEVEN AND TWELVE OF THE UTAH CONSTITUTION BY HIS ATTORNEY’S FAILURE TO MOVE THE TRIAL COURT FOR A DIRECTED VERDICT.

The United States Supreme Court has recognized that “the right to counsel is the right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 692 (1984). In *Strickland*,

the Supreme Court established a two-part test to determine whether counsel's assistance was ineffective. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. at 687, 80 L.Ed.2d at 693.

In making that assessment, the Court in *Strickland v. Washington* gave some guidance in noting, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. Although the Court in *Strickland* did not "exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance", *Id.* at 688, it did mention certain minimal requirements. These duties include, "a duty of loyalty, a duty to avoid conflicts of interest" as well as a duty "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution" *Id.* at 688. Additionally, the overarching requirement by the Supreme Court in ineffective assistance of counsel cases is that the "performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688.

Several other cases more specifically define when a defense counsel's performance has slipped below the threshold cited above.

In the case of *Kimmelman v. Morrison*, 477 U.S. 365 (1986) the Court was presented with a case where defense counsel, due to a failure to conduct proper discovery, did not timely file a motion to suppress evidence under the 4th Amendment. The Supreme Court found the attorney's performance to be deficient. The Court stated:

Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

In making the determination that trial counsel's conduct failed to comport with constitutional requirements the Court held:

In this case, however, we deal with a total failure to conduct pretrial discovery, and one as to which counsel offered only implausible explanations. Counsel's performance at trial, while generally creditable enough, suggests no better explanation for this apparent and pervasive failure to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." [citation omitted] Under these circumstances, although the failure of the District Court and the Court of Appeals to examine counsel's overall performance was inadvisable, we think this omission did not affect the soundness of the conclusion both courts reached — that counsel's performance fell below the level of reasonable professional assistance in the respects alleged. *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986).

The Utah Appellate Courts have adopted the *Strickland* test and have likewise rendered decisions in ineffective assistance of counsel cases that can guide a determination of when a defense attorney fails in his appointed duties.

In *State v. Smith*, 65 P. 3d 648, 656 (Utah Ct. App. 2003) this Court reversed a defendant's conviction under an ineffective assistance of counsel theory where counsel "fail[ed] to move for a directed verdict after the State failed to present evidence that Smith did not possess a valid concealed weapon permit during its case in chief."

In the present case, defense counsel failed to move for a directed verdict after the State rested. Assuming arguendo that defense counsel failed to make a motion to the trial court that the trial court would have granted, this failure, and this failure alone would constitute ineffective assistance of counsel under the definition of *Strickland* and its Federal and State progeny. The general practice of defense counsel in criminal trials is to move for a directed verdict or motion to dismiss after the state has rested. This is especially true when the state has failed to strongly establish one or more of the elements of the charge.

In *State v. Smith*, 65 P. 3d 648, 655 (Utah Ct. App. 2003) the Utah Court of Appeals held, "[w]e conclude that trial counsel's failure to raise this lack of evidence as a basis for dismissal of the charge is 'so deficient as to fall below an objective standard of reasonableness.'" (Citations omitted) In the present

case there is simply no reason for trial counsel not to move the court for a directed verdict when the evidence against the Defendant was that the police officers instigated the physical contact and that prior to being attacked the Defendant didn't threaten the officers. This failure clearly fulfills the first prong of the *Strickland* test.

The second prong of the test is whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, at 466 U.S. at 687, 80 L.Ed. 2d at 693. Again, in the case of *State v. Smith*, 65 P. 3d 648, 655 (Utah Ct. App. 2003) this Court ruled that "[h]ad trial counsel raised this lack of evidence, there is a reasonable probability that the trial court would have dismissed the concealed weapon charge."

In the case at bar, police officers were called to the Defendant's home because he was in a heated argument with his seventeen year old step-son. (R. 109/123). The police were called because a few weeks before the same son got in an argument with his mother (the Defendant's wife) and took a swing at her. (R. 109/123). When the police arrived, the seventeen year old was outside and the argument appeared to be over. Officer Carr went into the house to speak with the Defendant. He asked the Defendant if he had any weapons. The Defendant volunteered that he had a small pocket knife and pulled it out of his pocket. At this point, Officer Carr physically attacked the Defendant. The

Defendant hadn't threatened him in any way. Furthermore, the officer didn't ask for the knife. He simply attacked the Defendant. A couple of points in his testimony were very telling. For instance he said, "[w]e are trained to take weapons away from individuals, especially in (unintelligible)." (R. 109/85). He also testified that after he asked the Defendant if he had any weapons the Defendant said that he did and reached into his pocket. Rather than give the Defendant a chance to retrieve it he grabbed the Defendant and put him in a wrist lock. Officer Carr testified, "I manipulated his wrist around enough to grab the end of the knife and I attempted to pull that out. It was rather hard because he was clenching his fist very tightly. I did pull the knife out of his hand . . ." (R. 109/71).

Officer Carr still had the Defendant's wrist in a wrist lock after he took the small pocket knife out of his hand. He did this "to maintain control until I could search him for any further weapons." (R. 109/72). It was in this context and under these circumstances that caused the scuffle between the officers and the Defendant. It is important to note that although Officer Carr testified that the Defendant began to fight with him when he was asked what the Defendant did his answer was "I didn't detail exactly what he did physically because things were happening so quickly." (R. 109/73). Officer Carr did not testify to

any specific acts that would constitute an assault on the Defendant's part. Utah Code Annotated Section 76-5-102, lists the elements of assault. An assault is

- (a) an attempt, with unlawful force or violence, to do bodily injury to another;
- (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
- (c) an act committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

Officer Carr's testimony was pretty clear that he had control of the Defendant and the Defendant was struggling to get away.

This does not constitute an assault, especially when the officer is in the Defendant's home and has initiated the physical contact. Although the Defendant allegedly was yelling profanities at Officer Carr, the only one that could be construed as a threat was when he said, "I'll F-ing kick your F-ing A if you don't let me go." (R. 109/74). For a threat to be an assault it must be "accompanied by a show of immediate force or violence, to do bodily injury to another." U.C.A. §76-5-102(1)(c). It is clear from the testimony that Officer Carr had control of the Defendant at the time of the threat. There was also no evidence that this threat was accompanied by a show of immediate force.

Officer Mackely's testimony is equally problematic. While he testified that the Defendant hit him in the face with an elbow he didn't testify as to what force was used or whether he suffered an injury. The State bears the burden of

proving beyond a reasonable doubt each element of an offense. There was absolutely no evidence that Officer Mackley suffered an injury. Since we don't know how hard Officer Mackley was hit we don't know if there was a substantial risk of a bodily injury. Furthermore, Officer Mackley was behind the Defendant during the struggle and there was no evidence that the Defendant intended to strike Officer Mackley or if the elbow occurred while the Defendant was simply trying to get away from two very aggressive police officers.

Based on the insufficient evidence outlined above, Defendant's counsel should have moved the court to dismiss the case. Under Rule 17(p) of the Utah Rules of Criminal Procedure, the trial court "may issue an order dismissing any information ... upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense." Defense counsel did not raise that possibility for the trial court to decide.

POINT II

THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO ENTER A DIRECTED VERDICT OF AQUITTAL AT THE CLOSE OF THE PROSECUTIONS CASE FOR REASONS THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION.

In *State v. Holgate*, 10 P.3d 346, 350 (Utah 2000) the Utah Supreme Court held "as a general rule, claims not raised before the trial

court may not be raised on appeal.” However, this general rule is tempered when trial counsel’s performance falls below a reasonable standard. This Court further stated “[i]t necessarily follows that the trial court plainly errs if it submits the case to the jury and thus fails to discharge a defendant when the insufficiency of the evidence is apparent to the court.” *Id.* at 351 (emphasis added).

The Defendant recognizes the difficult burden he must overcome in challenging a trial court's failure to dismiss for lack of evidence. The court's power “to review a jury verdict challenged on grounds of insufficient evidence is limited.” *State v. Rudolph*, 3 P.3d 192, 196 (2000). The Utah Supreme Court has said, “[s]o long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops.” *State v. Mead* 27 P.3d 1115, 1132 (Utah 2001) (citations omitted). Additionally, in *State v. Workman*, 852 P.2d 981, 984 (Utah 1993) the Court stated, “[o]rdinarily, a reviewing court may not reassess credibility or reweigh the evidence, but must resolve conflicts in the evidence in favor of the jury verdict.”

The Utah Appellate Courts have, however, ruled that absent sufficient evidence establishing each element of the offense charged, an Appellate Court may overturn a conviction. In *State v. Workman*, *infra* at 985, the Utah

Supreme Court affirmed the trial court's arrest of judgment from a conviction of sexual exploitation of a minor holding: "A guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt." In that case, the prosecution presented no evidence, expert or otherwise, that the photograph in question could have been taken for purposes of sexual arousal. Given that lack of evidence the Court vacated the defendant's guilty verdict. Similarly, in the case of *State v. Petree*, 659 P.2d 443 (Utah 1983) the Court reversed the conviction of a defendant in a second degree murder case where the evidence as to intent was deficient. In that case there was undisputed evidence that the victim had been murdered. The sole evidence against the defendant consisted of the fact that the defendant was the last person seen with the victim, and the fact that he had related a dream to three individuals in which he recalled slapping the girl and that he "thought he hurt her. He thought he might have killed her." *Id.* at 446. In that case, the Court also stated:

The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidentiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict. The evidence, stretched to its utmost limits, must be sufficient to prove the defendant guilty beyond a reasonable doubt. *Id.* at 444-445.

Furthermore, in the recent case of *State v. Shumway*, 63 P.3d 94 (Utah 2002) the Utah Supreme Court reversed the trial court's conviction of evidence tampering. In that case, there was some expert testimony that opined that a second, smaller knife had also been used in a murder of an individual. No other evidence as to a second weapon (the first weapon was recovered) was found, but rather, the prosecution relied on an inference that the defendant had the motive and opportunity to dispose of a second weapon. In reversing that conviction, the Court held:

After giving full weight to all of the evidence supporting [the defendants] conviction of evidence tampering, we conclude that the evidence is insufficient to sustain his conviction. At most, the evidence supports only the proposition that [the defendant] had the opportunity to destroy or conceal the second implement, if indeed it ever existed. *Id.* at 100.

While the Defendant is cognizant of the requirement to marshal evidence in support of the jury's verdict, the Defendant submits that even with an extensive marshaling of evidence the jury's verdict cannot be supported. It is undisputed that it was Officer Carr who initiated the physical contact with the Defendant. The Defendant was in his home and the police had been called to assist him with a teen age son who had shown the propensity to violence in the past. By the time Officer Carr arrived the conflict had ended. Nonetheless, Officer Carr escalated the tension and created the scuffle that followed. When

he asked the Defendant if he had any weapons, the Defendant volunteered that he had a small pocket knife and indicated that the officer might consider it to be a weapon. When the Defendant attempted to retrieve the knife from his pocket he was attacked, put in a wrist lock, searched, taken to the ground, handcuffed, rendered unconscious and ultimately transported to the hospital.

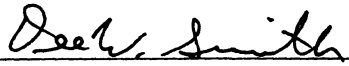
All of this notwithstanding, the State failed to prove all of the elements of assault which was out lined under Point I. For this reason, the trial court should have dismissed the case when Defendant's trial counsel failed to make a motion to dismiss. The evidence was insufficient to convict the Defendant of the crimes he was charged with. Furthermore, all three elements of a plain error claim are present. The error exists. The error being that the State failed to prove all of the elements of the offenses. Number two, this error should have been obvious to the trial court. The final element is that the error was harmful. Based on the insufficiency of the evidence the Defendant should not have been convicted. Therefore, he was prejudiced by the court's failure to dismiss the case and his convictions should be reversed.

CONCLUSION

The State failed to prove all of the elements beyond a reasonable doubt. Based on the lack of evidence, reasonable minds should have entertained a reasonable doubt that the Defendant committed the crimes he was convicted of.

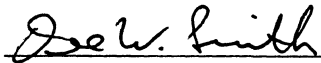
For these reasons, the Defendant respectfully requests this Court to reverse his convictions.

DATED this 30th day of March, 2005.


DEE W. SMITH
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant to Mark Shurtleff, Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor PO Box 140854 SLC, Utah 84114-0180, postage prepaid this 30th day of March, 2004.


DEE W. SMITH
Attorney at Law

ADDENDUM

ADDENDA A- Final Order (R. 81-83)
ADDENDA B- Officer Joshua Carr's Testimony (R.70-96)
ADDENDA C- Officer Reed Mackley's Testimony (R. 97-102)

ADDENDA A- Final Order (R. 81-83)

ADDENDA B- Officer Joshua Carr's Testimony (R.70-96)

ADDENDA C- Officer Reed Mackley's Testimony (R. 97-102)

ADDENDA A

FIRST DISTRICT - Box Elder COURT
BOX ELDER COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT COMMITMENT
 :
 :
vs. : Case No: 031100328 MO
 :
RICHARD WHITE, : Judge: BEN HADFIELD
Defendant. : Date: May 11, 2004

PRESENT

Clerk: shaunaw
Prosecutor: STEVENSON, H THOMAS
Defendant
Defendant's Attorney(s): DORIUS, DALE M.

DEFENDANT INFORMATION

Date of birth: May 26, 1959
Video
Tape Count: 9:57 AM

CHARGES

1. ASSAULT AGAINST POLICE OFFICER - Class A Misdemeanor
Plea: Not Guilty - Disposition: 04/01/2004 Guilty
2. INTERFERING W/ LEGAL ARREST - Class B Misdemeanor
Plea: Not Guilty - Disposition: 04/01/2004 Guilty

SENTENCE JAIL

Based on the defendant's conviction of ASSAULT AGAINST POLICE OFFICER a Class A Misdemeanor, the defendant is sentenced to a term of 1 year(s) in the Box Elder County Jail. The total time suspended for this charge is 1 year(s).

Based on the defendant's conviction of INTERFERING W/ LEGAL ARREST a Class B Misdemeanor, the defendant is sentenced to a term of 6 month(s) in the Box Elder County Jail. The total time suspended for this charge is 6 month(s).

Commitment is to begin immediately.

Case No: 031100328
Date: May 11, 2004

SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE

SENTENCES TO BE SERVED CONCURRENTLY.

SENTENCE FINE

Charge # 1 Fine: \$975.00
 Suspended: \$0.00
 Surcharge: \$461.49
 Due: \$975.00

Charge # 2
 Total Fine: \$975.00
 Total Suspended: \$0
 Total Surcharge: \$461.49
 Total Principal Due: \$975.00
 Plus Interest

SENTENCE FINE PAYMENT NOTE

DEF MAY RECEIVE CREDIT TOWARD THE FINE FOR OUT OF POCKET COSTS OF COUNSELING.

ORDER OF PROBATION

The defendant is placed on probation for 36 months.
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 2 months jail.
Defendant is to report to the Box Elder County Jail.

Defendant is to pay a fine of \$975.00 which includes the surcharge.
Interest may increase the final amount due.

PROBATION CONDITIONS

VIOLATE NO STATE, CITY, OR FEDERAL LAW EXCEPT MINOR TRAFFIC
SUBMIT TO RANDOM SEARCH AND SEIZURE AND CHEMICAL TESTING.
DO NOT POSSESS OR CONSUME ALCOHOL OR ILLEGAL DRUGS.
DO NOT FREQUENT PLACES WHERE ALCOHOL IS THE MAIN MENU ITEM, OR
PLACES WHERE ALCOHOL AND ILLEGAL DRUGS ARE USED OR SOLD.
DO NOT ASSOCIATE WITH PERSONS WHO CONSUME OR POSSESS ALCOHOL OR
ILLEGAL DRUGS.

Case No: 031100328
Date: May 11, 2004

SERVE 2 MONTHS JAIL
PAY A FINE AND SURCHARGE OF \$925 PLUS THE STATUTORY COURT SECURITY
FEE
PAY A PUBLIC DEFENDER FEE OF \$300
COMPLETE A SUBSTANCE ABUSE EVALUATION AND COUNSELING
COMPLETE A MENTAL HEALTH EVALUATION AND COUNSELING
TAKE MEDICATIONS AS PRESCRIBED
COMPLETE AN ANGER MANAGEMENT COURSE
MAINTAIN FULL TIME EMPLOYMENT AND/OR EDUCATION
WRITE A LETTER OF APOLOGY TO THE OFFICERS

Dated this ____ day of _____, 20____.

BEN HADFIELD
District Court Judge

ADDENDA B

1 are here and to come up. Rick, Mr. White, then ascended from
2 the stairway.

3 Q. That's the defendant who came up the stairs?

4 A. Yes.

5 Q. Can you describe his appearance or demeanor when he came
6 up the stairs?

7 A. Mr. White was very red in the face. He was sweaty and he
8 was -- it was very apparent that he was agitated just by his
9 demeanor. His shoulders were kind of squared coming up.
10 It's to be expected, especially in a family fight where
11 there's a lot of emotion involved.

12 Q. Did you then have any communication with Mr. White?

13 A. Yes. He was approximately about the same distance, maybe
14 a little shorter distance, from me to the jury away. I was
15 still trying to prop the door open and the stairway was about
16 that far away.

17 At that point, in order to interview him and make sure
18 that the scene was still secure, I opted to allow the door to
19 close. I asked Mr. White, the defendant, if he had any
20 weapons on him.

21 Q. What happened then?

22 A. At that point he automatically, if I remember
23 correctly -- I asked him if he had any weapon on his person.

24 Q. What was his response to that?

25 A. He stated that he did.

1 Q. Did he take any other actions as he stated that he did?

2 A. He said he did and put his hand in his pocket.

3 Q. Did you view that as problematic?

4 A. Yes. Absolutely, very much so.

5 Q. Why is that?

6 A. If he states he has weapons on his person and puts his
7 hands in his pocket, my impression is I need to neutralize
8 that. I interpreted that as my weapons are in my pocket. A
9 lot of times individuals will misinterpret that and want to
10 get the weapon out for you. But it happened so quickly that
11 as soon as he put his hands in his pocket I put light hands
12 on his left wrist, which was in his left pocket. I said keep
13 your hands out of your pocket. You don't need to pull the
14 knife out.

15 At that point he did pull his hand out pretty
16 aggressively. I looked down real quick to look at his hand
17 and I did notice a knife in his hand. I manipulated his
18 wrist around enough to grab the end of the knife and I
19 attempted to pull that out. It was rather hard because he
20 was clenching his fist very tightly. I did pull the knife
21 out of his hand and I clipped it somewhere on my belt, I
22 think, just to try and get it away from his person.

23 Q. What happened after that?

24 A. At that point, just as you are here, I was standing here
25 and Mr. White was here. I had his left wrist in a light

1 wrist lock so he could not take it away. Just to maintain
2 control until I could search him for any further weapons. He
3 had his right wrist clenched tightly and was kind of looking
4 back at me, but was also looking away from me to the family
5 or other individuals inside the home. He had his fist kind
6 of out away like this.

7 I asked him what he had in his right hand. I'm trying to
8 recall here. (Pause.) I did ask him what he had in his
9 right hand. He stated I'm just going to put it over here.
10 Rather than let him get closer to the family or to the
11 friends, relatives, sympathizers to complicate things, I said
12 drop it where it's at. He wouldn't do so. In fact I said
13 just go ahead and drop it right there and he didn't. In
14 fact, when I said that the second time he pulled away from me
15 toward the other individuals in the home.

16 Q. Is that problematic when he does something like that?

17 A. Yes, sir.

18 Q. Why is that?

19 A. At this point I interpreted his actions for a myriad of
20 things. I didn't know what his intentions were, but I do
21 know that at this point I've asked him to do something twice
22 and he purposefully, for whatever reason I don't know, but he
23 pulled away.

24 As he reached -- the second time I asked him to drop it
25 he did not. At that point I again needed to neutralize the

1 threat to myself, to the other individuals in the home. I
2 pulled him back away from the family and at that point he
3 began to progress to myself as well. We spun around
4 backwards. At that point it was myself and then Mr. White.
5 So I was between the family and Mr. White at this point.

6 As soon as he came around that point, around the back
7 side of me, in order to keep them two separate and find out
8 what was in his other hand, he immediately began to fight me.

9 Q. What was -- you say he began to fight with you. What did
10 he do?

11 A. It's hard to -- again, I didn't detail exactly what he
12 did physically because things were happening so quickly. I
13 just remember that this is probably I think the second time
14 in my career that I ended up in an actual physically
15 demanding position.

16 I did not want to let go of his left hand. It is my
17 obligation to maintain control of someone, obviously,
18 especially someone who was a possible suspect in a crime and
19 where he's being very aggressive. At this point he also -- I
20 put in my report the struggle continued against the back of
21 the front door as well.

22 At this point we flipped around and there was a wall
23 right here. The family was still in this kind of general
24 area. The entrance to the home is behind me at this point.
25 We swung around to where he was here and he was up against

1 this wall. I was back away from him. I had his wrist, left
2 wrist, like so. He had his right arm above him. He was
3 making the comments, as I quoted in my report, fuck you. And
4 excuse me, these are just quotes. If you prefer I can
5 abbreviate the quotes.

6 Q. Suffice it to say he was uttering profanities to you
7 during this?

8 A. You F-ing pig is one quote. And the other quote was I'll
9 F-ing kick your F-ing A if you don't let me go.

10 Q. All right. And as you're in this scuffle trying to
11 restrain him, did you take any physically aggressive action
12 to him?

13 A. At this point he was pushing away from the wall to try
14 and gain mobility to fight with me. I was pushing him closer
15 to the wall to restrain his mobility and gain access to his
16 other arm. At this point in our struggle he was pushing and
17 I was pushing.

18 The family started progressing toward me saying let him
19 go, he's not fighting you. Obviously his actions were
20 opposite of that. But in the course of this action we began
21 sliding across this wall and there were a lot of family
22 pictures on the wall that began dropping and breaking. We
23 slid back toward to where the door to the house came in right
24 behind me. We began to get into this corner, which was kind
25 of an advantage where he couldn't get away from me.

1 At that point I was hoping other officers could hear what
2 was going on. If I remember correctly, he did manage to push
3 free from the corner as my attention -- as I put in my
4 report, my attention was directed to the family as they were
5 progressing toward me.

6 **Q.** Was the family interfering with your attempts to restrain
7 the defendant?

8 **A.** Yes, sir. Probably in good intentions to try and help.
9 I don't know. Again, emotions are high. I don't know what
10 their intentions were. They did progress toward me saying
11 that I had to let him go. I'm trying to follow in my report.

12 **Q.** Did you have to take any physical actions toward the
13 family?

14 **A.** Actually I did. While he was in the corner I was trying
15 to tell the family to get back, get back. He pushed away
16 from the corner. I again kept him closer in the corner. The
17 family kept progressing toward me. I actually had to kick at
18 them and say get back.

19 Again, they kept progressing toward me. I almost didn't
20 know what else to do. I was hoping other officers would come
21 in and help.

22 **Q.** Did they come in at some point?

23 **A.** At that point they did try and get in. But I was trying
24 to keep him under control and the door was here. They were
25 trying to get in. I was trying could keep him under control.

1 They forced their way in, kind of squashing us behind the
2 door.

3 Q. Who came in?

4 A. Officer Mackley at that point.

5 Q. What did Officer Mackley do when he came in at that
6 point?

7 A. Officer Mackley came in and the door had closed behind
8 me. I was at this point here and Mr. White was here.
9 Officer Mackley came in from this direction. I gave him the
10 left arm to retain and he did keep hold of that arm. Mr.
11 White's other fist was still clenched with something in it.
12 I wasn't sure what, but it was up in the corner.

13 I tried to pull his arm back around, but physically I
14 couldn't force his arm down. I asked him, I said, if I pull
15 your arm down and I let go of your right arm, will you give
16 it to me and put it behind your back. The family was saying
17 just let him go. He'll cooperate, just let him go.

18 I loosened my grip on him so that he could pull his arm
19 down the corner of the wall. And instead of giving it to me
20 he sucked it up underneath his chest area and kept it away
21 from me.

22 Q. All right. What happened after that? Were you able to
23 restrain him?

24 A. At that point no.

25 Q. What happened then?

1 A. Umm, at that point he made a very abrupt movement with
2 his left elbow upward and he hit Officer Mackley in the chin
3 and in the face.

4 Q. All right. And what happened after that?

5 A. At this point I could still hear the family yelling.
6 Officer Morton had come in at this point. I could hear them
7 yelling at Officer Morton that he wasn't resisting us.

8 At that point -- I'm sorry. I have a lot of narrative
9 here. I'm trying to breeze through it. (Pause.) At that
10 point I did reach in with both hands. Officer Mackley had
11 ahold of his left arm. I had both hands available. I
12 reached in and grabbed his wrist and brought it back around
13 his back. We were able to, I believe, put handcuffs on him
14 at that point. (Pause.) I don't state in my report at what
15 point -- I don't think I put handcuffs on him, but I believe
16 we did at some time.

17 Q. So at some point you got him under control and he is
18 handcuffed?

19 A. Yes. There was a lot of broken glass on the floor and
20 objects on the wall, so we tried to move him away from the
21 wall and the floor, but he was still resisting us and
22 thrashing about and making the previous comments that I've
23 already stated.

24 Q. All right. Now, did you sustain any injuries in the
25 course of this?

1 A. I didn't realize it at the time, until after I had time
2 to calm down, let all the adrenaline out. I was doing the
3 report and I noticed that I had an abrasion on my elbow, some
4 blood there, and my shoulder kind of hurt on the inside, my
5 right shoulder.

6 Q. Did you go for treatment for that?

7 A. I did. Per policy, we have to report and make sure
8 things are okay. I did go to the emergency room and have it
9 looked at briefly.

10 Q. How long did you say you've been a police officer?

11 A. At this point, this was July of '03, so from 2000 to 2003
12 is about three years.

13 Q. And in the course of your employment as an officer have
14 you had occasion to come into contact with a lot of people
15 who are under the influence of alcohol?

16 A. Yes, I have.

17 Q. Did anything about the defendant strike you, give you any
18 reason, to suspect he was under the influence of alcohol?

19 A. With the struggle and everything going on so rapidly, at
20 that point I did not. I didn't have time and my senses were
21 so focused on my safety and what's going on. It's not every
22 day that we get in that kind of altercation, a physically
23 demanding type altercation.

24 Q. Okay. Now, after the defendant was restrained did you
25 stick around while he was being attended to and being

1 handcuffed?

2 **A.** Yes. We did move him away from the walls and the floor.
3 He continued to combat with us. At this point we're trained,
4 in order to keep someone under control, we lay them down on
5 the ground so they can't thrash about vertically. It reduces
6 their mobility so they're not -- they're a lesser threat to
7 themselves, can't kick things, can't kick us.

8 We laid him down on the ground. And at this point two
9 other officers were attending to him. And the family was
10 huddling over the top of us. And there was the kitchen right
11 behind him, which is a hot zone or hot spot of the house. We
12 are trained to believe that there are knives in there,
13 scissors, all sorts of weapons.

14 I asked the family to come into the other room. And they
15 were still yelling at us about what was going on. There are
16 family members on the floor. I ordered them, I said, please
17 go in this next room. I laid one hand on the wrist of one of
18 the females. I don't know if she pulled away from me or not,
19 but I had to lower my voice because everybody was yelling
20 about what was going on. The decibel level was so high. I
21 don't know if you've ever been in an argument with family
22 members, but everybody is yelling.

23 I had to change my tone of voice in order to get their
24 attention. I said please, let's go in this other room and
25 sit down. They did. They all came into the room. And I

1 had to ask them to sit down. It helps them to calm down,
2 especially while Mr. White is on the ground flailing about.
3 They did go in there and I began to just keep them separate.

4 At this point there were -- in the midst of all this I
5 did get on my radio. And I was not panicked, but I needed
6 more help than what we had. He was still fighting us. At
7 one point I called for more backup. When officers hear a
8 call for more help, especially in family fights, we usually
9 get just about everything that's available. They want to
10 make sure that their teammates, partners, are safe. We got a
11 lot of help at that point.

12 One of the sergeants on duty did arrive at that point.
13 He came in and began to talk to the family. I was very
14 shaken about my exertion physically with the fight that had
15 gone on. I went outside to make some notes, get witness
16 statement forms for the other individuals outside, and do
17 something other than be directly in contact with the person
18 I'd just been in the altercation with.

19 **Q.** In looking back at the events that transpired that
20 evening, do you feel that you did anything inappropriate or
21 anything that could be perceived as aggressive on the part of
22 the defendant?

23 **A.** Absolutely not. In fact, we are taught in the police
24 academy that on -- we are taught an escalation of force
25 continuum. My mere presence in a police uniform is

1 considered a level of force. It's an authoritative figure.
2 Officer presence they call it. That's the first level of
3 force.

4 The second one is verbal persuasion. The third one is if
5 they are still not cooperative we go hands on, light hands
6 on. We try to maintain control of the individual just by
7 grasping hands. At that point, if they're not cooperative
8 and still combating, we're encouraged to go one step above
9 what the combative person is at so we always have the upper
10 hand. If they're fighting us with fists we employ a baton
11 or OC spray or a canine. If they have a knife in their hands
12 we have to escalate one level above to keep ourself safe.

13 At this point I was -- I feel I was justified in pulling
14 my baton or OC spray, but everything had happened so quickly
15 that I didn't have time or a hand free to grab anything at
16 that point.

17 Q. So you feel you could have taken more severe actions or
18 march aggressive actions, but did not?

19 A. Yes.

20 MR. RASMUSSEN: I have no further questions at this
21 time.

22 THE COURT: Cross-examine.

23 MR. BOND: Thank you, Your Honor.

24 CROSS-EXAMINATION

25 BY MR. BOND:

1 Q. Was there an internal affairs investigation on this?

2 A. Yes, there was.

3 Q. And were you in fact suspended from duty?

4 A. I was not.

5 Q. What was the result of that?

6 A. There hasn't been a result. The case, as I have been
7 told, is incomplete. He hasn't typed it up.

8 Q. It's still going, though?

9 A. I don't know. I was told that the investigation is
10 complete, but the report has not been turned in to the chief.

11 Q. I see.

12 A. This is standard action.

13 Q. Were you removed from the S.W.A.T. team?

14 A. No.

15 Q. Were you on the S.W.A.T. team?

16 A. No.

17 Q. You were never on the S.W.A.T. team?

18 A. No.

19 Q. Have you ever been disciplined in the police force
20 before?

21 A. No.

22 Q. Not at all?

23 A. Written reprimands.

24 Q. For what?

25 A. I backed into a police car. I had a blind spot and I

1 didn't see it.

2 Q. Anything else?

3 A. Not to my knowledge.

4 Q. Not to your knowledge. Is there anything else? You
5 ought to know if you've been disciplined by the police force.

6 A. Little things like that.

7 Q. Any assaultive behavior?

8 A. No.

9 Q. You indicated that when you came into the house you were
10 about from where you are to the jury away. At least
11 according to what I read in your police report, the first
12 thing you said is do you have any weapons on you. Isn't it
13 true he reached into his pocket and pulled out a knife and
14 showed it to you?

15 A. No.

16 Q. And said you may consider this to be a weapon?

17 A. Actually that does sound familiar.

18 Q. So you saw this pocket knife?

19 A. Umm, I believe so.

20 Q. You were that distance away from him, right, according to
21 your previous testimony?

22 A. Uh-huh.

23 Q. So you saw the pocket knife?

24 A. No.

25 Q. You told me earlier you were that distance. If you have

1 something different now tell me.

2 A. At one point I had to close that distance.

3 Q. So that was after you saw the pocket knife, then?

4 A. When I closed the distance?

5 Q. Yes.

6 A. Yes.

7 Q. All right. So you see this pocket knife. Did you rush
8 at him and grab his arm as if this pocket knife was some kind
9 of threat?

10 A. Umm, I don't recall that.

11 Q. I know you don't recall because I saw you reading your
12 police report. You do recall that you saw the pocket knife
13 and you do recall that after you saw the pocket knife you
14 closed the distance, right?

15 A. Yes.

16 Q. Okay. But he didn't make any threats and in fact the
17 pocket knife wasn't even open, was it?

18 A. Not at that point.

19 Q. So you have a pocket knife that somebody pulls out of
20 their pocket and don't even open it. And they're as far away
21 from you as that jury, yet somehow you get into an
22 altercation with this defendant because of that pocket knife?

23 A. Not because of the pocket knife.

24 Q. What was your business of even touching him? He showed
25 you the knife and said you may consider this a weapon.

1 A. We are trained to take weapons away from individuals,
2 especially in (unintelligible).

3 Q. He opened his hand and showed it to you. Why didn't you
4 just take it out of his hand or say put it on the ground?
5 Instead you crossed a distance of that much to grab his hand
6 and start yanking on it?

7 A. I don't recall exactly what happened, other than the fact
8 that he had his hand in his pocket with the knife. I asked
9 him to just keep his hands out of his pocket. And he
10 forcefully pulled his hand out of his pocket with the knife
11 in his hand. At that point I pulled the knife out of his
12 hand as I'm trained to do.

13 Q. Where is this pocket knife?

14 A. It's in evidence right now.

15 Q. It's just a pocket knife, isn't it?

16 A. It is a knife.

17 Q. You didn't bring it court? It's a pocket knife that
18 anybody would carry in their pocket, right?

19 A. (Witness nodded his head.)

20 Q. It wasn't a switch blade?

21 A. No.

22 Q. It didn't have some big curved, serrated blade, did it?

23 A. I wouldn't have approached him if it was.

24 Q. It was just a little pocket knife and this was the
25 beginning of your grabbing, physically grabbing, the

1 defendant, isn't that true?

2 **A.** No. I feel like you're misconstruing my testimony.

3 **Q.** Let me read your police report to you. "Mr. White was
4 red in the face." Red in the face like he is right now? I
5 mean, is that safe to say?

6 **A.** More.

7 **Q.** More redder than that?

8 **A.** Yeah.

9 **Q.** "As I was advising him to keep his hands out of his
10 pockets he reached in his left hand into his front left
11 pocket. I secured his wrist right at that point."

12 **A.** I laid my hands on him, yeah.

13 **Q.** But as you already testified to the jury, you knew the
14 knife, had seen it by this time, right?

15 **A.** I believe so.

16 **Q.** So you tell me, if he didn't open the knife, if he didn't
17 pull out some other weapon like a gun, if he didn't say I'm
18 going to kill you, then why did you cross that distance when
19 he had his hand open with the little pocket knife in it?

20 **A.** As I explained previously, we're trained to retain
21 weapons from suspects or individuals in an altercation.
22 There was a lot of emotion involved.

23 **Q.** I don't recall you saying will you give me that weapon.
24 The only testimony I heard is the first thing you did was
25 grab his wrist.

1 **A.** I didn't have a chance to.

2 **Q.** Was he lunging at you with it? What do you mean you
3 didn't have a chance? You were 15 feet apart or something.

4 **A.** Again, in a situation like this, our first obligation is
5 our safety. If any individual is believed to have a weapon
6 it's our obligation and right to do a (unintelligible). That
7 is a search for a weapon. At this point he had his hand in
8 his pocket. I believed there was a possible weapon inside.

9 **Q.** Let me stop you there. You're just going on and on. You
10 didn't believe he had a possible weapon, he had his hand out
11 of his pocket with a knife in it. You saw it?

12 **A.** When I went light hands on he had his hand in his pocket.
13 There was a weapon. He told me --

14 **Q.** So you had your hand open -- he had his hand open with
15 the knife in it and then closed his hand and put it back in
16 his pocket and then you say, oh, he's got a weapon and you
17 lunge at him from 15 feet away?

18 **A.** No.

19 **Q.** Now you're contradicting yourself. You stated earlier
20 that you saw the knife open in his hand and he said you may
21 consider this a weapon. Now, suddenly, there's a guy with a
22 hand in his pocket and you're grabbing his wrist trying to
23 pull it out. I'm just trying to figure out which one it is?

24 **MR. RASMUSSEN:** Argumentative, Your Honor.

25 **THE COURT:** Sustained.

1 Q. (BY MR. BOND) So you did see the knife?

2 A. At several points.

3 Q. You did see the knife when you were that distance away,
4 as you testified earlier?

5 A. I may have. You described a point where he shows me a
6 knife and I vaguely remember that. It was a very stressful
7 situation.

8 Q. You do recall him saying you may consider this a weapon?

9 A. He may have made that comment. I don't recall.

10 Q. All right. So if somebody got up and testified he did
11 make that comment, you're not going to dispute, that, right?

12 A. I don't have grounds to. I don't remember him saying
13 that for sure.

14 Q. You indicated that the blade on this knife was an inch
15 and a half?

16 A. I didn't say.

17 Q. You don't know?

18 A. I didn't say how long it was.

19 Q. What turned out to actually be in his right hand?

20 A. I believe it ended up being a fish stringer. It has a
21 spike about that long. Then it has a string.

22 Q. How do you know that? I mean, that's confusing. You
23 just went through this whole thing about him having his hand
24 clenched up here and you thinking there's another weapon.
25 Suddenly there's this fish stringer that's this long wrapped

1 up in his hand in his fist where you couldn't see it?

2 **A.** At one point I tried to find the knife that I'd taken
3 away from him and it wasn't there. It had fallen. I looked
4 around and saw the knife on the piano with this fish
5 stringer. I looked at it and I said is this the knife. One
6 of the females present said yes, these are the things that
7 were on him. There was a cigarette lighter and the fish
8 stringer. I retained the fish stringer because it is
9 considered a weapon, a three-inch spike that long. And the
10 knife.

11 **Q.** You never saw this fish stringer, though, in his hand? I
12 mean, let's be realistic. You just testified it could have
13 been --

14 **A.** (Unintelligible.)

15 **Q.** You just testified it could have been a fish stringer
16 with a big spike that was this long or something. That was
17 never realistically in his right hand, was it?

18 **A.** When I was shown the fish stringer the rope was wrapped
19 around the spike, so you could just barely see the spike
20 hanging out the end of this string wrapped around it.

21 **Q.** You don't really know what was in his right hand, do you?

22 **A.** I never physically saw it in his right hand.

23 (Unintelligible).

24 **Q.** If somebody got up and testified --

25 **THE COURT:** Just a moment. Mr. Bond, you have to

1 allow him to answer the question.

2 **MR. BOND:** All right.

3 **Q. (BY MR. BOND)** Yes or no, you never actually saw what was
4 in his right hand, isn't that correct?

5 **A.** No, sir.

6 **Q.** If somebody got up and testified that it was a cigarette,
7 would you dispute that?

8 **A.** I don't believe I can.

9 **Q.** All right. Now, did you receive any information from
10 dispatch when you headed over there other than that this was
11 a family fight?

12 **A.** Umm, I believe I put on here -- normally dispatch will
13 tell us if they know there's weapons. When someone calls 911
14 they will say is there weapons involved. They like to inform
15 us as much as they can. They told us it was unknown whether
16 there were weapons involved.

17 **Q.** The only information you had was there was a family fight
18 and there were no weapons or alcohol reported to be involved,
19 isn't that correct?

20 **A.** That's what I put in here.

21 **Q.** So when you got there did you have any idea who the focus
22 of this investigation was?

23 **A.** I knew there was an altercation between two or more
24 possible individuals.

25 **Q.** That's all?

1 A. Yes.

2 Q. And you spoke to the kid, this Derek, right, when you got
3 there? You put him in handcuffs?

4 A. I did not, no.

5 Q. Somebody did?

6 A. Yes.

7 Q. Was he in handcuffs when you got there?

8 A. No. Just as I was arriving he was placed in handcuffs.

9 Q. Did you talk to him at all?

10 A. I don't think I asked him any questions or anything, no.
11 I was just assisting with Officer Morton.

12 Q. You had a dog with you?

13 A. Yes.

14 Q. Is it Cello?

15 A. It is pronounced Cello.

16 Q. Why did you take the dog to the door?

17 A. He's my partner. He goes everywhere I go.

18 Q. Obviously he's your partner and you take him, I guess,
19 but what was the purpose of having a dog go to a family fight
20 situation?

21 A. The primary purpose of a canine is officer safety.

22 Q. To sic him on somebody, I guess?

23 A. No. If somebody becomes violent with me the dog can
24 interfere or intervene and assist me in apprehending the
25 individual.

1 Q. There were other dogs in the house. Did they see this
2 dog of yours?

3 A. I never saw dogs in the house.

4 Q. So your dog just laid on the porch?

5 A. He did.

6 Q. The whole time?

7 A. As he was told.

8 Q. You called for backup, is that right?

9 A. Yes, sir.

10 Q. At what point was that?

11 A. I don't recall. Again, this was a very high --

12 Q. After he was subdued or before it?

13 A. No. I wouldn't have called for more help if I didn't
14 feel like we could control the situation. At one point I do
15 remember his family huddling over us yelling that he had to
16 be let go. He was making these comments to us and we still
17 couldn't get him under control.

18 Q. You indicated that you called for backup prior to him
19 being subdued, right? At some point you got your radio out
20 and called for backup?

21 A. No. My radio is directly underneath here.

22 Q. How do you do that, click a button or something?

23 A. Key the mic.

24 Q. So at least with one of your hands you keyed the mic. Do
25 you have to keep that mic keyed the entire time you're

1 talking?

2 A. Yes.

3 Q. So what did you say?

4 A. If I remember correctly, I was probably screaming Box
5 Elder two Charlie 16, which is myself. 1078, which means
6 send more help. More help is needed.

7 Q. You testified you were so -- earlier you testified that
8 you were so -- your hands or something -- somehow you said
9 that you couldn't get your baton or your mace. But you could
10 have -- because he was so out of control you could have?

11 A. At this point he was on the floor in handcuffs.

12 Q. When you called?

13 A. Yes.

14 Q. I just asked you if he was subdued and you said no?

15 A. He was not subdued. He was detained, but not subdued.

16 Q. But he was in handcuffs?

17 A. Yes, he was.

18 Q. So you still had your hand on him or something?

19 A. Yeah. I was trying to held him down on the ground to
20 keep him from kicking everybody. I had one hand available to
21 call for more help. He was still fighting us very
22 aggressively.

23 Q. You actually grabbed one of the females, I think you
24 said?

25 A. They would not leave these officers to help detain this

1 individual. They kept huddling over us. This is a highly
2 dangerous situation for us.

3 Q. Just answer the question yes or no, did you grab one of
4 the females?

5 A. Yes.

6 Q. Okay. And you also indicated that you didn't want them
7 going in the kitchen?

8 A. Yes.

9 Q. Because there's knives and forks and other dangerous
10 items?

11 A. Yes.

12 Q. There was an old man and a woman. Which one of them did
13 you think was going to go in there and get a knife and come
14 back and attack you?

15 A. There was more than one female.

16 Q. There were two females then?

17 A. I believe there was three females.

18 Q. Three females and an old man, is that right?

19 A. May have been.

20 Q. What do you mean may have been?

21 A. I can look through my witnesses here and see who was
22 there. There was a Ronna White that was there.

23 Q. Is that his wife?

24 A. I don't know. It just says her name as a witness. There
25 was a Linda Webster who was there. Richard, who is the

1 defendant. There was a Heather Sparrow who was outside.

2 Q. Do you remember who was in the room?

3 A. Umm, at what point?

4 Q. Well, at least at the time that you thought somebody was
5 going to go get a knife out of the kitchen.

6 A. At any point someone could go get a knife out of the
7 kitchen.

8 Q. At the point where you told them not to go into the
9 kitchen and to go somewhere else. During this
10 altercation how many --

11 A. There were two officers trying to detain him on the
12 floor. And family members were huddling over us yelling you
13 need to let him go.

14 Q. Besides police officers did anybody else go in and out of
15 the room?

16 A. At what point? Just right then?

17 Q. At any time.

18 A. Yes. There were other officers.

19 Q. Besides police officers were there any other people going
20 in and out of the rooms or in and out of the house?

21 A. I don't know.

22 Q. I'm just trying to figure out who was in that room when
23 this happened other than police officers?

24 A. From what I remember, it was only the family that was
25 inside the house when the call came in.

1 Q. All right. Not the Shutz kid?

2 A. No.

3 Q. He never came in, right?

4 A. I don't think so, no.

5 MR. BOND: That's all.

6 THE WITNESS: Maybe, after he was taken in an
7 ambulance to the hospital, I think that maybe Derek was
8 brought inside. I believe so.

9 MR. BOND: Thank you.

10 THE COURT: Redirect.

11 MR. RASMUSSEN: A few questions, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. RASMUSSEN:

14 Q. Now, when you saw that the defendant was reaching for a
15 weapon, or had a weapon, did you give him specific
16 instructions with regards to what he should do?

17 A. Yes. The instructions were clear to keep his hands out
18 of his pockets.

19 Q. And did he comply with those instructions?

20 A. He pulled his hand out of his pocket and I did see the
21 knife in his hand at that point.

22 Q. And did you feel threatened by this?

23 A. Yes, I did.

24 MR. RASMUSSEN: All right. I have no further
25 questions.

ADDENDA C

1 **THE COURT:** Anything further, Mr. Bond?

2 **MR. BOND:** No, Your Honor.

3 **THE COURT:** You may step down. Your next witness.

4 **MR. RASMUSSEN:** The state calls Officer Reed
5 Mackley, Your Honor.

6 **REED MACKLEY,**

7 being first duly sworn, was examined and
8 testified as follows:

9 **DIRECT EXAMINATION**

10 **BY MR. RASMUSSEN:**

11 **Q.** Please state your name for the record.

12 **A.** Arthur Reed Mackley.

13 **Q.** All right. And who were you employed by on July 30th,
14 2003?

15 **A.** I was employed as a police officer with Perry City.

16 **Q.** And how long had you been a police officer at that time?

17 **A.** Approximately one year.

18 **Q.** All right. Now, directing your attention to the evening
19 of July 30th, were you dispatched to a family fight on that
20 evening?

21 **A.** I was.

22 **Q.** Do you recall what the circumstances surrounding your
23 dispatch were?

24 **A.** It was reported to be a family fight between a father and
25 a son.

1 Q. All right. And were you called to assist on that, then?

2 A. I was.

3 Q. What happened when you arrived on the scene?

4 A. Umm, upon my arrival I found Officer Ione Higley outside
5 of the residence. There was what appeared to me to be a
6 juvenile in custody sitting on the ground. Shortly
7 thereafter I heard what sounded like breaking glass and
8 yelling. People fighting is what it sounded to me like.
9 Myself and Officer Jason Morton --

10 Q. Did you respond to that?

11 A. I did. We approached the door. We had knowledge that
12 Officer Carr was inside because he had signed out there prior
13 to my arrival. We tried to make entrance into the home and
14 found the door to be blocked. It was partially opened, but
15 blocked. We were having a hard time getting through the
16 door. It appeared to me that -- I was under the impression
17 that someone was trying to prevent us from getting into the
18 home due to the fighting inside.

19 Q. Okay.

20 A. We were unable to push the door open, Officer Morton and
21 I. We immediately realized the reason was that Officer Carr
22 and the defendant were behind the door. Officer Carr --

23 Q. What were they doing behind the door?

24 A. It appeared that Officer Carr was attempting to arrest
25 the defendant. He had him in a control hold. He was

1 resisting.

2 Q. By resisting, what was the defendant doing when you say
3 he was resisting?

4 A. I could hear Officer Carr yelling commands such as give
5 me your hands, stop resisting. When we were finally able to
6 get inside the home and turn around behind the door, the
7 defendant had his arms tucked in and was fidgeting around.
8 That made it difficult for Officer Carr, it appeared, to gain
9 control of him.

10 Q. Did you see any aggressive actions by Officer Carr toward
11 the defendant?

12 A. No. It just appeared he was trying to take the defendant
13 into custody and was having a difficult time doing so.

14 Q. All right. And did you become involved in the
15 altercation between Officer Carr and the defendant?

16 A. I did. There were also, I would say, about four other
17 adults in the home. When we made entrance they were visibly
18 upset and yelling at Officer Carr. Officer Morton took it
19 upon himself to try and -- they are moving towards him. It
20 appeared that they were converging upon him. Officer Morton
21 took it upon himself to tell them to stay back while I
22 attempted to assist Officer Carr in putting handcuffs on the
23 defendant.

24 Q. All right. And what happened as you were trying to put
25 handcuffs on the defendant? Did he make any physically

1 aggressive actions toward you?

2 **A.** He did. I grabbed his left arm, Officer Carr grabbed his
3 right arm. We each had a control hold on each arm and we
4 were trying -- at that point trying to get handcuffs on him.
5 His arm was, I would say, sweaty and my hands were a little
6 bit sweaty and I lost my grip on his arm. At that point I
7 was standing behind him and slightly to the left. The
8 defendant, when his arm was freed from my grasp, turned his
9 head over his left shoulder and threw his elbow up into my
10 face, striking me in the nose.

11 **Q.** All right. What happened after that?

12 **A.** At that point we were able to regain control of him. I
13 had his left arm and Officer Carr had his right arm. I
14 suggested to Officer Carr that where we were standing up
15 against the wall wasn't working and that we put him down on
16 the ground on the carpet in the living room, which was
17 adjacent to where we were at. We were able to put him face
18 down on the ground and at that point I was able to put
19 handcuffs on him.

20 **Q.** All right. And at that point did Officer Carr radio for
21 more assistance?

22 **A.** He did. The reason being is that the defendant was still
23 struggling. We were giving orders to comply, stop resisting,
24 and that wasn't happening. He was attempting to, it appeared
25 to me, get up from the ground where he was at and so Officer

1 Carr requested more assistance.

2 Q. Could you describe for us the defendant's demeanor, his
3 behavior, throughout this? I mean, was he talking to you as
4 this went on?

5 A. He was yelling various obscenities at us. Yelling in
6 general. When he got down on the ground I could smell a
7 strong odor of an alcoholic beverage coming from his person.

8 Q. Okay. As you were holding him on the ground, once you
9 got him there, did he then cooperate with you and the other
10 officers at all?

11 A. Not for several minutes, at least a couple of minutes.
12 He was still thrashing around, for lack of a better term. It
13 appeared to me he was repeatedly trying to get up from off of
14 the ground. I placed one of my knees across his back in an
15 attempt to keep him on the ground so he would not get up and
16 hurt himself or anyone else. I didn't put my full weight on
17 him, just enough to keep him down on the ground.

18 Q. All right. In the course of your assisting in this did
19 you see any behavior on the part of any officers that you
20 felt was inappropriate?

21 A. I did not. Officer Carr and myself were both yelling
22 commands at the defendant to comply, give us your hands. We
23 were saying that rather loudly. I didn't see any
24 inappropriate action, no.

25 Q. All right. And did you yourself feel threatened as you

1 were trying to assist Officer Carr in restraining the
2 defendant?

3 **A.** I did. Especially after being struck in the face by his
4 elbow, yes.

5 **MR. RASMUSSEN:** Okay. No further questions, Your
6 Honor.

7 **THE COURT:** Cross-examine.

8 **MR. BOND:** I don't have any questions right now,
9 Your Honor.

10 **THE COURT:** You may step down.

11 **MR. RASMUSSEN:** May this witness be excused?

12 **THE COURT:** Any reason we can't excuse this witness?

13 **MR. BOND:** We might want to recall him.

14 **THE COURT:** You'd like him to remain?

15 **MR. BOND:** Yes.

16 **THE COURT:** All right. If you'll wait outside the
17 courtroom.

18 **MR. RASMUSSEN:** Your Honor, the state calls Officer
19 Chad Panter.

20 **CHAD PANTER,**

21 being first duly sworn, was examined and
22 testified as follows:

23 **DIRECT EXAMINATION**

24 **BY MR. RASMUSSEN:**

25 **Q.** Please state your name.